

ACI's 3rd U.S. Customs Compliance Boot Camp

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Lessons Learned from the Biggest, Most Expensive Customs Violations in Recent Memory – The Outside Counsel Perspective

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Some pretty scary numbers

- \$45 million
- \$8 million + \$3 million in attorneys' fees
- 20 years in prison



Other things to keep you awake at night

- Customs-savvy competition
- Derivative lawsuits
- SOX
- Shareholder class actions
- Valuation and bankruptcy
- Liability for others in the transaction chain



Case study



Genesis of an investigation

- Inspection at the border
- Requests for information
- Pre-Assessment Surveys, Focused Assessments
- Whistleblowers / informants / “the competition”
- Parallel / daisy-chain investigations
- Government-to-government information sharing (MOUs)
- Change in control event



Informants

- e-Allegations

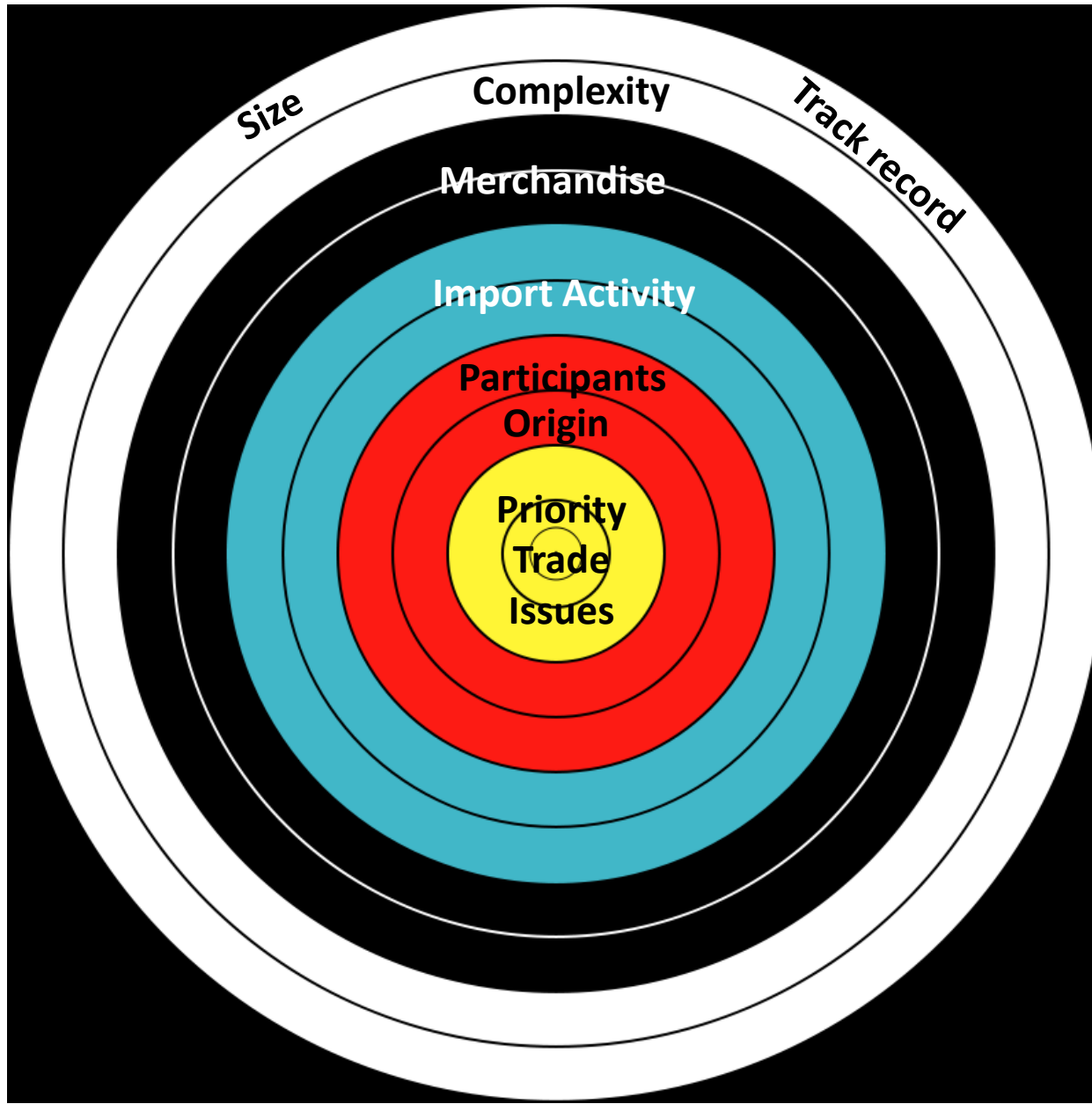
<https://apps.cbp.gov/eallegations/>

- 19 U.S.C. § 1619 – award of compensation to informers (“moiety”)

- Form 4623



Targeting



Priority Trade Issues

- Antidumping and Countervailing Duties
- Import Safety
- Intellectual Property Rights
- Textiles/Wearing Apparel
- Trade Agreements



Case study



AD/CVD Targeting

AD/CVD “audit surges”

- 88 audits of importers of AD/CVD commodities in FY 2013 – a 73% increase from FY 2012
- CBP identified AD/CVD discrepancies worth almost \$71 million and collected over \$46 million in duties – a 250% increase in collections from FY 2012

CBP August 2014 Report to Congress on AD/CVD Enforcement and Compliance Initiatives



Other targeting mechanisms

- Automated Targeting System
- National Targeting Center for Cargo Operations (NTC-C)
- National Targeting and Analysis Groups
- Commercial Targeting Analysis Center
- Centers of Excellence and Expertise

Written testimony of CBP Acting Assistant Commissioner

(July 16, 2014)



Red Flags

- Prior problems
- Changes in sourcing patterns
- Valuation issues
- New market entrant
- Changes in personnel, location, port, importer of record
- Lack of management support, compliance policy, procedures, internal controls, documentation, training, oversight of third parties



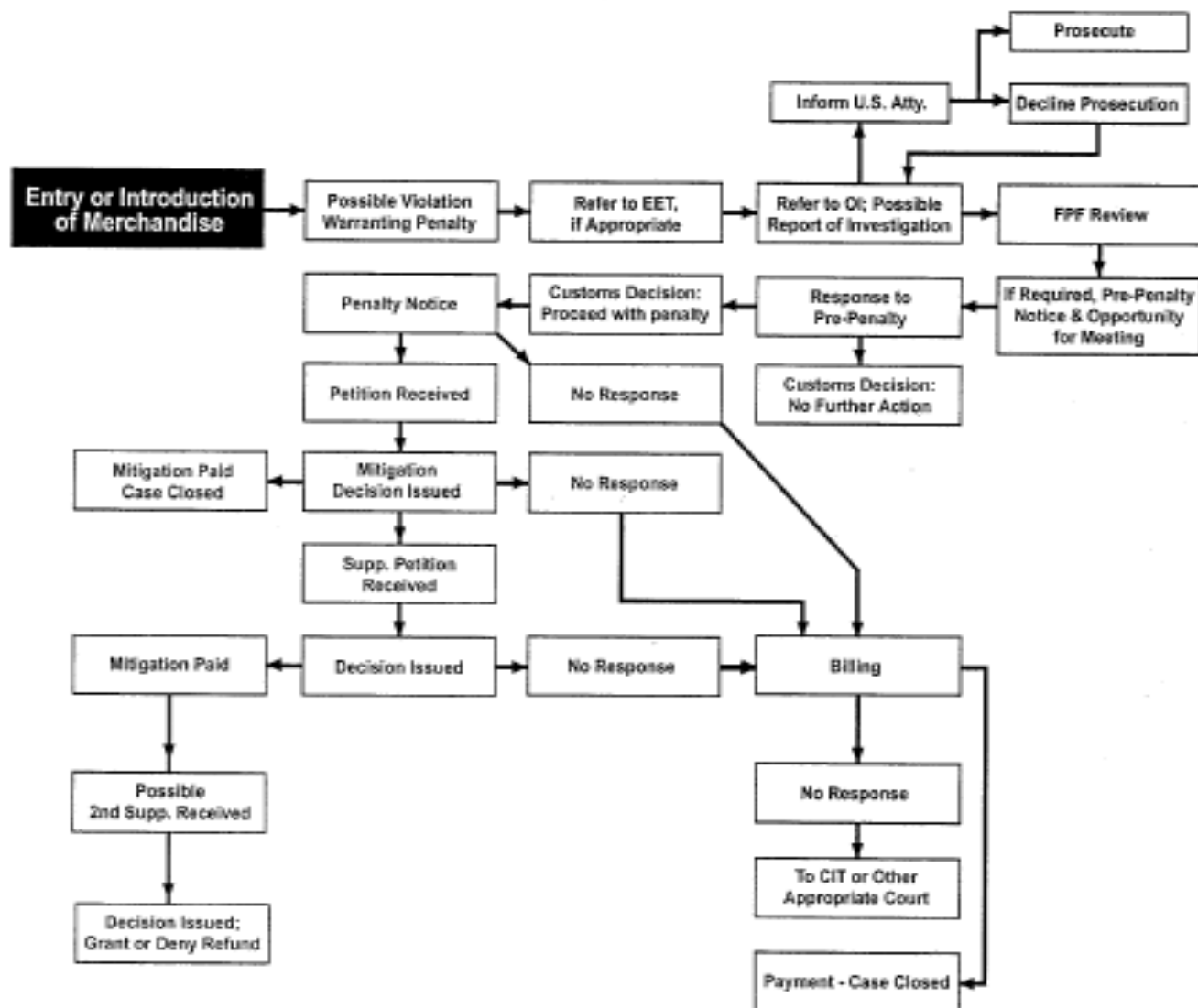
Penalty Process

- *Request for information (CF28)
- *Notice of Action (CF29)
- Prepenalty notice (30 days to respond)
- Penalty claim / decision not to assess
- Petition for relief
- Compromise / judicial enforcement / appeal



Administrative Process:

Penalties



Offers in compromise may be submitted at any point in the process. All are subject to approval by ORR, ITC Division and Chief Counsel.



How to respond

- Be prepared (go to the Thursday session)
- Stop the bleeding
- Follow best practices for internal investigations
- Investigate more than just the subject of the FA or pre/penalty notice
- Consider other corrective and disciplinary actions



Case study



Penalties

- Commercial fraud and negligence (19 U.S.C. § 1592)
- False certificates of origin for exports to NAFTA countries (§ 1592(f))
- Drawback penalties (§ 1593a)
- Recordkeeping penalties (§ 1509)
- Falsity / lack of manifest (§ 1584(a)(1))
- Equipment and vessel repairs (§ 1466)
- Customs broker (§ 1641)
- Criminal penalties (e.g., 18 U.S.C. § 1001)



Mitigation / Prior Disclosures

- Section 1592 fraud, gross negligence, negligence
- A valid prior disclosure will limit liability
 - Fraud:
 - Duty loss: 100% of the total loss of duty
 - No duty loss: 10% of dutiable value
 - Gross negligence or negligence:
 - Duty loss: Equal to interest on actual loss of duty
 - No duty loss: No monetary penalty



Mitigation / Prior Disclosures

- **Mitigating factors**

- Contributory Customs error
- Cooperation with the investigation (extraordinary cooperation beyond that normally exhibited - proactive, not just providing books and records)
- Immediate remedial action
- Inexperience in importing
- Prior good record
- Inability to pay
- Customs knowledge of actual violation but Customs failed to inform violator to enable earlier corrective action

- **Aggravating factors**



Not just the importer of record

- 2014 Federal Circuit *en banc* decision in Trek Leather
- Potential liability under Section 1592 can reach any “person” who introduces merchandise into the United States
- Compliance is a collective responsibility



Other things to worry about



SOX Obstruction Of Justice

18 U.S.C. § 1519

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . , or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.



SOX Example

- United States v. Chavez: DOJ charged that importer's submission of false entry documents and actions to cover up alleged fraud constituted obstruction of justice under Section 1519
- Penalty of up to 20-years in prison
- There is no Customs fraud gang in Federal prison



False Claims Act Lawsuits

- The False Claims Act (FCA) 31 U.S.C. §§ 3729-33
- Private parties may bring *qui tam* suit, receive up to 30% of total recovery
- Toyo Ink SC Holdings Co. Ltd. (\$45 million settlement of FCA allegations related to AD/CVD duties)



Shareholder and investor suits

- Case study



Successor liability

- CBP may seek to collect unpaid duties, fines, and penalties from a successor-in-interest
- Successor liability may be asserted under various theories, including common law and state law (substantial continuity, *de facto* merger, etc.)
- Liability can attach even in cases of a pure asset purchase out of bankruptcy
- Potential blind-spot in bankruptcy proceedings



Successor liability example

United States v. Adaptive Microsystems, LLC
(Ct. Int'l Trade 2013)

- Genuine issue of material fact whether a purchaser of assets from bankrupt importer was liable for nearly \$7 million in unpaid customs duties previously incurred by the importer
- CBP based its successor liability claim on common law exceptions to general rule of no successor liability for asset purchases
- Case settled in 2014 for undisclosed sum



Many follow-on consequences

- Impact on stock price, sale price
- Risk of shareholder / investor suits
- May lead to potential purchasers walking away from the deal
- “In this world nothing can be said to be certain, except death and taxes.”



Case study



Enforcement priorities for 2015

- Priority trade areas
- Especially AD/CVD, FTAs, and IPR
- Companies that are not working with CBP can expect closer scrutiny



Case study



Questions

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